Maheswari a/p Eliathamby & Anor v Koperasi Serbaguna Kebangsaan Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO C-02–2021–11 OF 2014
ABANG ISKANDAR, UMI KALTHUM AND ASMABI MOHAMAD JJCA
17 AUGUST 2018

Evidence — Standard of proof — Balance of probabilities — Whether plaintiffs proven their case against defendants on balance of probabilities — Whether trial judge committed any error of fact or law warranting appellate intervention

The appellants jointly owned a piece of land ('the land') which they bought after taking a loan from the fifth respondent ('HSBC') and charging the land to it as security. The appellants alleged that although they had settled the loan, HSBC had not returned the original title deed to them. The first appellant ('A1') alleged that some months after the HSBC loan was fully settled she faced financial difficulties and sought help from a man (Ben David Eric) who had since died ('the deceased'). The deceased apparently arranged for A1 to get funds but told her that she would have to charge the land again as security. A1 said she agreed to the arrangement and was introduced by the deceased to the third respondent ('R3') who claimed to be a lawyer acting for the first respondent ('R1'). The appellants claimed they signed several documents thinking that they were for a charge for the loan but later learnt that the land had been transferred to R1 pursuant to a sale and purchase agreement ('SPA') in consideration for the sum of RM600,000 and that all relevant documents evidencing the transaction were signed by them in front of the second respondent ('R2'). The appellants sued the respondents for various reliefs contending that they never intended to sell the land and that the transfer to R1 was fraudulent; that R2 and R3 had conspired to commit fraud and that HSBC was negligent in releasing the title deed to third parties without their instruction. Apart from general damages, the appellants sought a declaration, inter alia, that the SPA and transfer of the land to R1 was null and void and that the land be transferred back to them. In its statement of defence, R1 said that the SPA was genuine and that it had fully paid the appellants the purchase price for the land. R1 said police had investigated the matter and concluded that no further action on their part was necessary. In their defence, R2 and R3 said they had prepared the SPA as instructed by the appellants and R1 and denied all other allegations made by the appellants. HSBC contended that it had returned the original title deed to the appellants after they had settled the loan. After a trial, the High Court dismissed the appellants' claim. The instant appeal was against that decision.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) The trial judge's decision and findings did not warrant appellate interference. The decision was not shown to be plainly wrong or one that no reasonable tribunal would have arrived at. The trial judge had appreciated the evidence judiciously and assigned the weight to the evidence adduced before her with the distinct audio-visual advantage of observing the demeanour of the witnesses. The trial judge concluded that the first appellant's evidence was more improbable compared to that of the respondents' witnesses and that the second appellant had very much repeated what the first appellant had told her. On the evidence, the appellants had failed to prove their case on balance of probabilities (see paras 44–45).

(2) The first appellant denied that she signed the SPA but failed to discharge the burden of proving that the signature in the document was not hers. Even after examining the appellant's sample signatures made at the trial, the trial judge could not form an opinion on the matter. The appellants did not call any expert witness to assist the court in this regard (see paras 24 & 28).

(3) The trial judge correctly found from the evidence that the first appellant had taken back the original title deed to the land from HSBC after attending at HSBC's office and signing documents acknowledging receipt of the title deed. Accordingly, the trial judge correctly found that the allegation of negligence against HSBC was not proven (see paras 31–32).

(4) The trial judge correctly found from the evidence that, on balance of probabilities, there was a sale of the land by the appellants to the first respondent and that the allegation of alleged conspiracy against the relevant respondents had not been made out (see paras 37–38).

(5) There was no evidence of any loss suffered by the appellants. In fact, in her testimony, the first appellant admitted that she had not suffered any losses (see para 41).

[Bahasa Malaysia summary

Perayu-perayu secara bersama memiliki sebidang tanah ('tanah tersebut') yang mana mereka beli selepas mengambil pinjaman daripada responden kelima ('HSBC') dan caj tanah tersebut kepadanya sebagai jaminan. Perayu-perayu mendakwa bahawa walaupun mereka telah menyelesaikan pinjaman, HSBC tidak memulangkan surat ikatan hakmilik asal kepada mereka. Perayu pertama ('A1') mendakwa bahawa beberapa bulan selepas pinjaman HSBC diselesaikan sepenuhnya dia mengalami masalah kewangan dan memohon pertolongan daripada seorang lelaki (Ben David Eric) yang telah meningggal dunia ('si mati'). Si mati jelas menguruskan untuk A1 mendapatkan dana tetapi

memberitahunya yang dia perlu caj tanah tersebut lagi sebagai jaminan. A1 menyatakan dia bersetuju kepada penyusunan tersebut dan diperkenalkan kepada responden ketiga ('R3') yang mendakwa adalah peguam bertindak bagi responden pertama ('R1'). Perayu-perayu mendakwa mereka menandatangani beberapa dokumen memikirkan yang ia untuk caj bagi pinjaman tetapi kemudiannya mendpaat tahu yang tanah tersebut telah dipindahkan kepada R1 berikutan perjanjian jual beli ('PJB') dalam balasan untuk jumlah RM600,000 dan bahawa kesemua dokumen relevan menunjukkan bukti transaksi yang ditandatangani oleh mereka di hadapan responden kedua ('R2'). Perayu-perayu menyaman responden-responden bagi pelbagai relief dengan berhujah bahawa mereka tidak berniat untuk menjual tanah tersebut dan bahawa pindahan kepada R1 adalah fraud; bahawa R2 dan R3 telah berpakat untuk melakukan fraud dan bahawa HSBC adalah cuai dalam melepaskan surat ikatan hakmilik kepada pihak ketiga tanpa arahan mereka. Selain daripada ganti rugi am, perayu-perayu memohon perisytiharan, antara lain, bahawa PJB dan pindahan tanah tersebut kepada R1 adalah tak sah dan batal dan bahawa tanah tersebut dipindahkan semula kepada mereka. Dalam penyataan pembelaannya, R1 menyatakan bahawa PJB adalah tulen dan bahawa ia telah dibayar sepenuhnya oleh perayu-perayu harga belian bagi tanah tersebut. R1 menyatakan polis telah menyiasat perkara tersebut dan menyimpulkan bahawa tiada tindakan lanjut oleh pihak mereka adalah perlu. Dalam pembelaan mereka, R2 dan R3 menyatakan yang mereka menyediakan PJB tersebut seperti yang diarahkan oleh perayu-perayu dan R1 dan menafikan kesemua tuduhan lain yang dibuat oleh perayu-perayu. HSBC berhujah bahawa ia telah memulangkan surat ikatan hakmilik asal kepada perayu-perayu selepas mereka menyelesaikan pinjaman tersebut. Selepas perbicaraan, Mahkamah Tinggi menolak tuntutan perayu-perayu. Rayuan ini adalah terhadap keputusan tersebut.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Keputusan dan dapatan hakim perbicaraan tidak mewajarkan campur tangan mahkamah rayuan. Keputusan tidak menunjukkan jelas salah atau satu yang tiada tribunal yang munasabah akan capai. Hakim perbicaraan telah menilai keterangan dengan bijak dan meletakkan berat kepada keterangan yang dikemukakan di hadapannnya dengan kelebihan audio-visual yang berbeza memerhati sikap saksi. Hakim perbicaraan memutuskan bahawa keterangan perayu pertama adalah lebih sukar diterima akal berbanding kepada saksi-saksi responden-responden dan bahawa perayu kedua mengulang apa yang perayu pertama beritahunya. Atas keterangan, perayu-perayu telah gagal untuk membuktikan kes mereka atas imbangan kebarangkalian (lihat perenggan 44–45).

(2) Perayu pertama menafikan yang dia menandatangani PJB tersebut tetapi

gagal untuk melepaskan beban pembuktian bahawa tandatangan atas dokumen bukan tandatangannya. Walaupun selepas memeriksa tandatangan contoh perayu-perayu dibuat semasa perbicaraan, hakim perbicaraan tidak dapat membentuk pandangan atas perkara tersebut. Perayu-perayu tidak memanggil mana-mana saksi pakar untuk membantu mahkamah berkaitan ini (lihat perenggan 24 & 28).

(3) Hakim perbicaraan mendapati dengan betul daripada keterangan bahawa perayu pertama telah mengambil balik surat ikatan hakmilik asal kepada tanah tersebut daripada HSBC selepas hadir di pejabat HSBC dan menandatangani dokumen-dokumen mengakui terima surat ikatan hakmilik tersebut. Dengan itu, hakim perbicaraan dengan betul mendapati bahawa tuduhan kecuaian terhadap HSBC tidak dibuktikan (lihat perenggan 31–32).

(4) Hakim perbicaraan secara betul mendapati daripada keterangan bahawa, atas imbangan kebarangkalian, terdapat jualan tanah oleh perayu-perayu kepada responden pertama dan bahawa tuduhan dakwaan pengkomplotan terhadap responden-responden relevan tidak dibuat (lihat perenggan 37–38).

(5) Tidak terdapat keterangan mengenai apa-apa kerugian yang dialami oleh perayu-perayu. Sebenarnya, dalam keterangannya, perayu pertama mengaku bahawa dia tidak mengalami apa-apa kerugian (lihat perenggan 41).]

Notes

For cases on balance of probabilities, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3032–3034.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177, KBD (refd)
Bukit Unggul Golf and Country Resort Sdn Bhd v Bukit Ringgit Holdings Sdn Bhd [2017] MLJU 1817, CA (refd)
Chou Kooi Peng & Anor v PP [1998] 3 SLR 593, CA (refd)
Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors [2018] 2 MLJ 693; [2017] 10 CLJ 385, FC (refd)
Folkes v Chadd (1782) 3 Doug KB 157 (refd)
Gasing Heights Sdn Bhd v Aloyah Bte Abd Rahman & Ors [1996] 3 MLJ 259; [1996] 3 AMR 3001, HC (refd)
Lee Ing Chin@ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (folld)
Ma Clyde v Wong Ah Mei & Anor [1970] 2 MLJ 183, FC (refd)
Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, HL (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)

Quinn v Leathem [1901] AC 495, HL (refd)
R v Turner [1975] 1 All ER 70, CA (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, FC (refd)
Tan Sri Dato' Tajudin bin Ramli & Anor v Celcom (Malaysia) Bhd & Anor and another appeal (No 2) [2014] 3 MLJ 842; [2014] AMEJ 0375, CA (refd)

Legislation referred to

Evidence Act 1950 s 45
National Land Code Form 14A

SS Seelan (SS Seelan & Assoc) for the appellant.
M Ramachelvam (Rama-Rozi & Assoc) for the first defendant.
Jude Alexander (Alexander & Partners) for the second and third defendants.
Dahlia Lee Wooi Mien (Law Chamber of Dahlia Lee & Co) for the fifth defendant.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] Maheswari a/p Eliathamby ('the first plaintiff'/'SP1') and Sumitra Navaneetha Nathan ('the second plaintiff'/'SP2') were registered owners of a piece of land at GRN 6704 Lot 1478, Mukim of Tras, Raub, Pahang ('the land'). They shared the land in equal portions.

[2] The land was bought at the price of RM420,000 with a loan secured from HSBC Bank ('the fifth defendant'). The land was also charged to the fifth defendant as security. The loan was fully repaid on 25 January 2002.

[3] However, even after the full payment of the loan, it was alleged by the plaintiffs that neither the first plaintiff nor the second plaintiff had collected the original title deed from the fifth defendant. Neither had they instructed anybody to take the same from the fifth defendant.

[4] Sometime in June 2002, the first plaintiff faced financial difficulties. The situation led her to ask one Ben David Eric ('the fourth defendant/deceased') for financial assistance.

[5] In July 2002, the deceased told the first plaintiff that he was negotiating with somebody for the financial assistance. However, according to the deceased, the first plaintiff needed to provide RM20,000 to him for banking charges to charge the land, to which the first plaintiff complied.

[6] Few weeks after that, the deceased, in the presence of the first plaintiff met the second plaintiff at her house, together with Ajantha Thinakaran ('the third defendant'). The third defendant introduced herself as an advocate and solicitor, who was representing Koperasi Serbaguna Kebangsaan Bhd ('the first defendant'). The first defendant asked the second plaintiff to sign several documents purported to be related to the charge as security for the financial assistance.

[7] Sometime in 2004, the first plaintiff learnt that the land had been transferred to the first defendant vide a sale and purchase agreement dated 8 December 2003 ('the SPA') (P49). The SPA purported to be entered between the first and second plaintiffs on one side and the first defendant on the other side. The SPA was prepared by the third defendant. Upon search conducted at Pejabat Tanah dan Galian Pahang, it was revealed that based on Form 14A, the plaintiffs were paid RM600,000 as consideration and the documents were signed by them before one Kalisewaran a/l Sinniah ('the second defendant').

[8] The plaintiffs contended that the transfer was made by fraud on the part of the first defendant, and conspiracy to commit fraud by the second and third defendants as they never intended to sell the land. The fifth defendant was alleged to have been negligent in releasing the title deed of the land without their instruction.

[9] In this suit, the plaintiffs had claimed against the first defendant for the following:

(a) a declaration that the plaintiffs have no intention to transfer the land to the first defendant at all material times;

(b) a declaration that the transfer of land to the first defendant is null and void;

(c) a declaration that the SPA is null and void;

(d) a declaration the memorandum of transfer (Form 14A) used in the transfer is null and void;

(e) an order that the first defendant to transfer the land to the plaintiffs;

(f) an injunction to restrain the first defendant or his agent to deal with the land until the disposal of this case;

(g) general damages;

(h) interest;

(i) cost of solicitor-client basis; and

(j) any relief as the court deems fit.

[10] As against the second, third, fourth and fifth defendants, the plaintiffs had claimed for the following:

(a) general damages;

(b) costs on solicitor-client basis; and

(c) any relief as the court thinks fit.

[11] Against the sixth defendant, the plaintiffs had claimed for the followings:

(a) an order that the defendant to cancel the endorsement of transfer No 2202/2004 and to register the plaintiffs as the registered owner of the land; and

(b) any relief as the court thinks fit.

CASE FOR THE DEFENDANTS/DEFENCE

[12] In the statement of defence, the first defendant contended that it had paid the plaintiffs the sums of RM165,000 as part of the purchase price of the land, and not a loan. The first defendant also claimed that the full purchase price of RM600,000 had been paid to the plaintiffs pursuant to the SPA. The police investigations had concluded with the recommendation of 'No further action'.

[13] The second and third defendants simply denied the plaintiffs' allegations in their statement of defence, except the fact that they used to discuss with the plaintiff's about the sale and purchase of the land and admission that the first defendant had indeed made part payment of the purchase of land to the plaintiffs. The second and third defendants also admitted that they prepared the SPA upon the instruction of the plaintiffs and the first defendant.

[14] The fifth defendant claimed the original title deed and the copy of it had been returned to the plaintiffs upon their completion of repayment of the loan. The documents were collected by the plaintiffs themselves at the fifth defendant's office on 30 January 2002. The fifth defendant also raised the time bar issue.

[15] On 24 October 2014, the High Court dismissed the plaintiff's claim with costs of RM30,000 be paid to the first and fifth defendants each, and RM20,000 to the second and third defendants collectively.

[16] Dissatisfied with the decision, the plaintiffs appealed to the Court of Appeal.

THE APPEAL

[17] After hearing both parties and deliberating the submissions, we, on 8 December 2016, unanimously found that there was no merit in the appeal, thus we had dismissed the same with costs of RM20,000 to each set of defendants, being the respondents in this appeal subject to the payment of allocatur. These are our reasons of having so decided. For the purpose of this grounds of judgment, parties will be referred to as they were in the High Court.

OUR FINDINGS

[18] Before us, the plaintiffs raised several issues for our deliberation vide the memorandum of appeal and written submissions and from the written grounds of decision of the learned trial judge, which we would distil them to be as follows:

(a) whether the plaintiffs sold the land to the first defendant?

(b) whether the first, second, third, and fifth defendants had conspired with the fourth defendant to defraud the plaintiffs in the sale and purchase of the land? and

(c) whether the plaintiffs suffered any damage?

[19] However, it must be noted as a matter of law that the standard of proof applicable in civil cases had been clarified by our apex court in the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584. That decision was delivered on 10 August 2015. That case has put right, once and for all, what is the correct and proper standard of proof that shall be applicable in all civil cases in Malaysia. In the *Sinnaiyah & Sons Sdn Bhd* our apex court had occasion to say as follows:

> The correct principle to apply is ... where it was stipulated that at law, there are only two standard of proof, namely beyond reasonable doubt for criminal cases and on the balance of probabilities for civil cases. As such, even if fraud is the subject in a civil claim, the standard of proof is on the balance of probabilities. There is no third standard. Therefore, it is up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim, to find whether the standard of proof was attained. The criminal aspect of the allegation of fraud and the standard of proof required is irrelevant in the deliberation.

[20] As such, the correct standard of proof to employ in this case should have been the standard of proof on the balance of probabilities. But as an appellate court, we are entitled to subject the evidence adduced before the trial court and

decide whether on that lower threshold standard of proof, the plaintiffs ought to have been found to have established their case against the defendants and were therefore entitled to have judgment entered in their favour.

[21] It is opportune to state that those identified issues had been contentious issues and after hearing and appreciating the evidence adduced before her, both oral as well as documentary, the learned trial judge had made the various findings of facts in the course of coming to the conclusions on those issues and thence on her ultimate decision on the overall claim by the plaintiffs against the various defendants. It is trite law that, the trial judge always has the distinct advantage of having seen and observed the demeanour of witnesses that appear before him or her. This advantage is also held by the trial judge even over the appellate court because it is the trial court that has the in situ audio-visual advantage. Premised on that realisation, prudence has advised that great deference has to be accorded to the findings of facts made by the trial judge unless that advantage is lost through gross misfinding of facts by the trial judge, against the weight of evidence. If that happens, the appellate court is at liberty, indeed it is duty-bound, to intervene and come to its own findings on a proper appreciation of the evidence.

[22] On the standard of proof that ought to be applicable, on the authority of the apex court case of *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693; [2017] 10 CLJ 385 ('*Prem K Sahgal* case'), an appeal court should be employing the correct standard of proof applicable and then subject the evidence to that correct standard of proof accordingly. In this case, the correct standard of proof ought to be one on the balance of probabilities. In the *Prem K Sahgal* case the apex court had the occasion to say:

> [53] We agree with the Court of Appeal that the decision of this court in *Sinnaiyah* was applicable to this case as the appeal of this case was still pending in the Court of Appeal when this court delivered its judgment in *Sinnaiyah* case. In fact, this issue has been decided by this court in *Letchumanan Chettiar Alagappan (as executer to SL Alameloo Achi (Deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 at pp 763–764; [2017] 5 CLJ 418 at pp 480 and 481:
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> > [88] Prospective overruling had been applied in Malaysia. But was it applied in *Sinnaiyah,* such that it had no retrospective effect, even to the instant appeal from a decision decided by the trial court before the change in the law? 'It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect' *(Abillah Labo Khan v Public Prosecutor* [2002] 3 MLJ 298; [2002] 3 CLJ 521 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court). 'The law as so stated applies not only to that case but also to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the ... decision was overruled' (*Kleinwort Benson Ltd*). 'Because of the doctrine of precedent, the same would be true of everyone else whose obligations would be decided according to the law as enunciated ... even though the relevant events occurred

before that decision was given' (Lord Nicholl's fourth 'feature' in the judicial system, see also *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2006]1 CLJ 457, where it was held by the court, as per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, that the Court of Appeal was bound to follow *Muhammad bin Hassan,* notwithstanding that the conviction was handed down before the change in the law). The law as so stated in a superior judgment would apply to cases which have not yet gone to trial or are still in progress and to appeals that have been brought timeously but have not yet been concluded (*Cadder v Her Majesty's Advocate* per Lord Hope) and to matters or cases not yet finally determined, but the retrospective effect of a judicial decision is excluded from cases already finally determined (*Gadder v Her Majesty's Advocate* per Lord Rodger). That is the common law position. There was no departure in *Sinnaiyah* from the common law position when the court said 'we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims'. The court merely underscored the retrospective and prospective effect of its decision, to apply to that appeal and to future cases, to cases as yet not filed and trials or appeals which have yet to be finally determined, but not to past cases which have reached a terminal end. The ruling in *Sinnaiyah* was not in the prospective-only form. *Sinnaiyah applies to all cases that have not been finally determined, including all pending appeals,* except that in the instant appeal, it does not matter. (Emphasis added.)

[23] On account of that ruling by the apex Court in the *Prem K Sahgal* case, on the overall appreciation of the evidence led by the plaintiffs, we were of the respectful view that even subjecting the same evidence as adduced, on the lower standard of proof of on the balance of probabilities, the plaintiffs had failed to establish their claims against the relevant defendants. We agreed with the learned trial judge's findings of facts on the material issues, especially with regards to the signature of the first plaintiff on the sale and purchase agreement in respect of the said land and the custody of the document of title of the said land at the material time. These are key issues and indeed before us, all learned counsel had dwelled on these issues at some length.

[24] On the signature issue, the first plaintiff denied that she had signed on the sale and purchase agreement for the sale of the land to the first defendant. This denial by the first plaintiff had effectively amounted to a plea of *non est factum* or simply put, 'this is not my signature'. As the plaintiff had alleged that the signature was not hers, the onus or burden fell on her to show that on the balance of probabilities that she was not the source of the impugned signature. As to what had transpired during the trial, the first plaintiff was asked to make samples of her signature in order for the court to form an opinion. However, even with that, the learned trial judge was not able to form her opinion as to the genuineness or otherwise of the first plaintiff's purported signature. On top of that, the first plaintiff herself was not helpful when her evidence was put under scrutiny.

[25] Still pertaining to this issue, with respect, we could not agree with the learned counsel for the first plaintiff when he submitted that it would not do much good for the first plaintiff to lead any expert evidence on the signature issue as an expert's evidence would have been a *mere opinion* of such witness. We wish to reiterate that not just any witness can express his opinion in a court of law. Witnesses of facts testify only on what he has observed with his senses and relate the evidence to the court during trial. It is left to the trial judge to then make the proper inferences from the evidence adduced in making the findings of facts. This is because it is trite that only opinions of experts are admissible in any court of law. Section 45 of the Evidence Act 1950 is clear on that. In fact, that same section mentions specifically 'the genuineness of handwriting' as being one of the instances where opinion of an expert or experts may become relevant. The law was emphatically stated by Lawton LJ in the English case of *R v Turner* [1975] 1 All ER 70 at p 74 where he said: 'The foundation of these rules was laid by Lord Mansfield CJ in *Folkes v Chadd* (1782) 3 Doug KB 157 at p 159 and was well laid: 'The opinion of scientific men upon proven facts', he said, 'may be given by men of science within their own science'. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary'.

[26] This *Turner*'s case was followed in the Singapore case of *Chou Kooi Peng & Anor v Public Prosecutor* [1998] 3 SLR 593. See also the case of *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 (FC). In essence what this means is that expert evidence is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the presiding judge. Opinions of non-experts are not admissible. In other words, witnesses of facts *simpliciter,* keep their opinions, whatever they may be, to themselves.

[27] As to how much weight is to be assigned to an expert's opinion would depend on the particular circumstances of each case, much would depend on the credibility of the expert witness concerned. But, having said that, it was not correct for the learned counsel for the first plaintiff to have such a dim view of expert opinion and to then dismiss such evidence as 'mere opinion', as though it is not worthy of belief at all. Experts come to court because their evidence can assist the court in a wide spectrum of knowledge pertaining to issues concerned with the sciences and the arts, with which the court is not otherwise well versed with. Although the expert witness's evidence does not necessarily bind the trial judge, his opinion, if credible, is worthy of much deference by the court and could assist the court in coming to a crucial finding of fact in a case.

[28] In the circumstances of this case, in the absence of any expert opinion as to its origin, we were in agreement with the learned trial judge on her findings pertaining to the signature of the first plaintiff. The learned trial judge had the distinct advantage of having observed the demeanour of the first plaintiff in her court. She had found the first plaintiff (SP1) to be a meticulous person and that she would not have done anything unless she was sure about it. In short, she would act deliberately as opposed to acting in haste and without due care. In the context of this case, the fact that the learned trial judge was herself unable to conclude on the sample signature by the first plaintiff would necessarily mean that the opinion of an expert on signature was required and that onus was with the plaintiffs to discharge as it was their pleaded case, as per para 199(h) of the *peryataan tuntutan terpinda* that the first plaintiff's signature had been forged. But, as it came to pass, that onus was not discharged by the plaintiffs.

[29] On the issue of the custody of the document of land title of the said land, it was the first plaintiff's case that the said document was at all times with the fifth defendant HSBC Bank even after she had paid off the loan for which the said land title was charged with the HSBC Bank as security. It was the first plaintiff's case that the HSBC Bank was negligent when it had released the said land title without her prior authorisation. This had been the basis for the plaintiffs' claim against the HSBC Bank as the fifth defendant in this action.

[30] The law on proof of negligence is trite. The plaintiffs will need to establish that the fifth defendant owed them a duty of care and that the defendant had breached that duty, and as a result of which the plaintiffs had suffered damages. The onus is on the plaintiffs to prove their case against the fifth defendant, unless where *res ipsa loquitor* applies, in which case, the evidentiary burden shifts to the fifth defendant to disprove that particular factual circumstance that is peculiarly within his exclusive knowledge (see generally the case of *Ma Clyde v Wong Ah Mei & Anor* [1970] 2 MLJ 183).

[31] Evidence was led on this issue by both sides. In her grounds of decision, the learned trial judge made a finding of fact that the land title was indeed in the possession of the HSBC at some point in time, but as at *30 January 2002* that land title was no longer in the HSBC Bank's custody. In fact, on that day, the first plaintiff had come to the HSBC Bank herself and she had collected the said land title from the said bank. That was also a finding of the learned trial judge. We had looked at her grounds of decision and we found at pp 17–20, at paras 13–15, the following:

> Saya mendapati perkara sabjek yang menjadi pertikaian di dalam kes ini ialah suratan hakmilik asal tanah milik plaintif yang dikatakan tanpa persetujuan atau kebenaran Plaintif-Piaintif telah dengan cuainya dilepaskan oleh defendan kelima kepada pihak defendan-defendan sehingga tanah tersebut didaftarkan atas nama defendan pertama. Oleh yang demikian kedudukan posesi terakhir suratan

hakmilik asal tanah adalah penting untuk ditentukan bagi memastikan dengan siapakah suratan hakmilik asal tanah berada. Adakah pada masa material ianya masih berada dalam jagaan defendan kelima atau berada dengan defendan pertama, kedua, ketiga dan keempat atau dengan plaintif-plaintif.

Saya merujuk kepada keterangan SP1 di dalam keterangan pemeriksaan utama beliau yang menyatakan di Soalan dan Jawapan No 44 seperti berikut:

> (44) Q: Do you have any knowledge as to how the Original Title and the security documents to the property left the custody of the fifth Defendant?
>
> No. I feel that if it was solely due to the fifth Defendant's negligence that they had released the Original Title to some other person or persons as neither I nor the Second Plaintiff had presented ourselves at the fifth Defendant's office to collect the title and the other documents either from 'Miss Poh' or any other staff of the fifth Defendant.
>
> *I would also state that if the fifth Defendant had not been negligent in releasing the Original Title, then this fraudulent transfer of my property to the first Defendant would not have taken place …*
>
> SP1 telah menyalahkan Defendan Kelima yang telah dengan cuai melepaskan geran asal hartanah SP1 kepada pihak ketiga menyebabkan pemindahan hartanah plaintif-plaintif telah dibuat secara penipuan/frod oleh Defendan-Defendan.

[14] SD3 mengesahkan beliau melihat sendiri SD4 mengambil semua dokumen sekuriti daripada peti simpanan ('safe') dan menyerahkan kepada SD3 untuk diletakkan di troli sementara menunggu untuk dikutip atau diambil oleh pelanggan. SD3 telah menyerahkan suratan hakmilik asal hartanah salinan gadaian, surat tawaran, surat persetujuan dan surat kuasa wakil kepada SP1 sendiri. SP1 telah disahkan hadir sendiri ke bank pada 30 Januari 2002. SD3 juga mengesahkan bahawa beliau sendiri telah menyemak kad pengenalan SP1 bagi memastikan bahawa orang yang datang mengambil dokumen-dokumen tersebut adalah SP1 sendiri. Bagi membuktikan bahawa dokumen-dokumen sekuriti telah diambil oleh SP1, SP1 telah menurunkan tandatangan beliau seperti di P56 (ms 95 KM66). Selain terdapatnya tandatangan SP1, SD3 dan SD4 juga menurunkan tandatangan ringkas mereka untuk mengesahkan dokumen-dokumen yang disenaraikan telah diambil oleh SP1.

[15] SP1 di dalam keterangannya telahpun mengesahkan bahawa tandatangan di P56 adalah tandatangan beliau dan mengakui bahawa tujuan SP1 pergi ke bank pada 30 Januari 2002 adalah untuk mengambil dokumen-dokumen.

Rujuk Q&A No 170 ms 153 NK Jld 1

> S: You came to the bank to collect the documents on 30/1/2002?
>
> J: Yes

Rujuk Q&A No 175 ms 155 NK Jld 1

> S: You had signed this documents and take back and acknowledged the receipt of the documents, correct?

J: Yes.

Rujuk Q&A No 178 ms 156 NK Jld 1

S: I also suggest to you that you met up a lady called Chong Mui Fong whereby her initial is here CMF on the Form that you signed next to her who was attending to you at the bank.

J: If I am there, and if I had signed it then it is true. Sometimes, they have signatures and sometimes they don't have signatures.

Rujuk Q&A No 179 ms 156 NK Jld 1

S: Do you agree that by signing this and all the ticks at the last page, you had actually taken back the title?

J: It is a few years ago and I am old. I can't remember if the bank has given, the bank has given me.

Fakta yang tidak dinafikan adalah bahawa pada 30 Januari 2002 SP1 telah pergi ke bank untuk mengambil geran asal dan semua dokumen sekuriti mengenai tanah dan dokumen-dokumen tersebut telahpun diambil oleh SP1 dengan akuan terima dokumen yang ditandatangani oleh SP1.

[32] As such, on the evidence, both oral and documentary, the learned trial judge had found that the plaintiffs had failed to prove that the HSBC Bank had breached its duty of care to the plaintiffs pertaining to the release of land title. On a review of the evidence led in that regard, we were in agreement with learned counsel for the HSBC Bank that the learned trial judge was correct in coming to the conclusion which she did. During cross-examination of the first plaintiff herself, she had admitted that she had, in fact, collected the said land title document when confronted with the relevant documents which she had duly signed acknowledging the receipt of her land title from SD7, the officer of the fifth defendant. Prior to that, it was the plaintiffs' case that the land title had always been with the HSBC Bank for safe keeping and that she never collected it. It was her case that the fifth defendant was negligent in parting with the said land title without her authorisation.

[33] Based on the above appreciation of the evidence, we found that the learned trial judge was correct in finding that there was a sale of the said land by the plaintiffs to the first defendant on the balance of probabilities.

[34] As regards the alleged conspiracy between the second, third and/or fourth and the fifth defendants to defraud the plaintiffs, we were with the learned counsel for the defendants that the evidence as led by the plaintiffs had failed to establish the allegations levelled against them on the applicable standard of proof on the balance of probabilities. A tort of civil conspiracy takes place when two or more persons conspire to do an unlawful act and as a result of which injury is caused to another from the commission of that act. It usually

would involve a common plan or design or intention among the co-conspirators in its commission so as to achieve its purpose or intention. As a direct result thereof, injury or damages is caused to the plaintiff. In this case, the alleged conspiracy among the defendants had been to defraud the plaintiffs of their land thus allegedly causing loss to the plaintiffs. The particularisation of the fraudulent intent underlying the conspiracy allegation was contained in para 19 of the *pernyataan tuntutan terpinda*, in particular in sub-paras (h) and (i) therein. In essence, it was alleged that the second and third defendants *together with or through* Ben David Eric (the deceased) had conspired ('telah merancang secara frod') to obtain the original land title from the fifth defendant (HSBC Bank) by falsifying the signature of the first plaintiff.

[35] The findings on this allegation as levelled by the plaintiffs against the defendants made by the learned trial judge can be found in para 26 of the learned trial judge's grounds of judgment. We reproduce the same, below:

> [26] *Adakah Defendan 1, 2, 3 dan 5 bersubahat/berkonspirasi dengan Defendan Keempat menipu Plaintif-Plaintif dalam transaksi jualbeli hartanah tersebut?*
>
> SD1 baru mengenali defendan keempat apabila diminta pergi bersama-sama berjumpa SP1. SD5 juga mengenali defendan keempat apabila defendan keempat berjumpa SD5 untuk membantu SP1 menjual tanah SP1. Defendan kelima langsung tidak mengenali defendan keempat. SD1 dan SD5 juga tidak mengenali T/N Pathma Nalli. Defendan keempat juga tidak begitu rapat dengan SP1 dan SP2. Maka itu dalam keadaan apakah defendan pertama, kedua, ketiga dan keempat telah menipu SP1 dan SP2. Plaintif-plaintif telah membuat satu laporan polis pada 11 September 2005 mengenai isu penipuan dan penyelewengan di dalam jualbeli hartanah tersebut dan melalui surat Jabatan Siasatan Jenayah Komersil IPD Subang Jaya, Selangor bertarikh 3 September 2013 (D115 ms 2 KM124) memaklumkan kepada peguamcara defendan pertama bahawa pihak polis telah selesai menjalankan siasatan berhubung report USJ 8 Report 10145/05 dan kes telah dirujuk kepada TPR Selangor dan diputuskan kes telah di NFA ('No Further Action') pada 26 November 2007. Berdasarkan kepada keterangan saksi-saksi, mahkamah mendapati plaintif-plaintif gagal mengemukakan sebarang bukti bahawa defendan pertama, kedua dan ketiga ataupun defendan keempat (simati) dan defendan kelima bahawa kesemua defendan mempunyai pengetahuan dan bersubahat bersama-sama menipu plaintif-plaintif dalam mendapatkan suratan hakmilik asal tanah milik plaintif-plaintif daripada defendan kelima.

[36] We were in agreement with the submissions by learned counsel for the defendants that the first plaintiff was involved in the impugned transaction every step of the way. She had signed on the SPA, beginning with the collection of the land title from the office of the fifth defendant HSBC Bank. It ended with her own evidence that she did not suffer any losses as a result of the land transaction with the first defendant. It is easy to allege conspiracy, but to prove it, even on the balance of probabilities, is quite another thing altogether.

[37] In this case, we were of the view that the conclusion arrived at by the learned trial judge that there was insufficient evidence led by the plaintiffs to prove the alleged conspiracy as per her reasons, as appeared in para [26] of her grounds of decision, was a reasonable and acceptable one. The fact that the evidence as led by the plaintiffs, might have cast suspicion against the defendants was of not much a consequence. Suspicion, is never, in law, a substitute for proof or evidence. Suspicion, however grave, will not be capable of establishing a factual circumstance, even on the lower threshold applicable in a civil claim such as in this case before us. In a case involving an allegation of conspiracy, there must be sufficient particularisation of the conspiracy among the defendants, detailing their roles in the commission of the conspiracy, either by way of overt acts or otherwise. Again, pleadings must be subsequently substantiated by evidence coming from the relevant witnesses. Evidence must be led by the plaintiffs to establish, on the balance of probabilities, the roles played by the respective defendants in the web of conspiracy they were alleged to have created to defraud the plaintiffs of their rightful property, to wit, the landed property that is the subject matter of this suit. In the case of *Gasing Heights Sdn Bhd v Aloyah Bte Abd Rahman & Ors* [1996] 3 MLJ 259; [1996] 3 AMR 3001 it was held that the plaintiff must specifically plead and prove that the conspirators, in effecting the agreement or combination through lawful means, had the sole or predominant purpose of injuring the plaintiff.

[38] Having perused through the record of appeal we were not able to accede to the learned counsel for the plaintiffs' contention that the alleged conspiracy had been established. In the circumstances as presented in this case, with respect, we agreed with the learned counsel for the defendants that the evidence as adduced by the plaintiffs had fallen short of proving their case of conspiracy against the respective defendants, even on the lower threshold, on the standard of proof on the balance of probabilities. It was alleged in para 19(h) of the *pernyataan tuntutan terpinda* that the second, third and/or through the deceased had the unholy plan among them involving the first plaintiff's signature be forged. We had seen the evidence led on the matter that pertained to the first plaintiff's signature. At its highest, it had remained not proved by the first plaintiff that her signature had been forged. We were of the considered view that the dictates in the *Gasing Heights* case were not fulfilled by the plaintiffs in this appeal before us, for judgment to be entered in their favour.

[39] As regards the issue of damages, the plaintiff in a civil suit must prove that he has suffered damages at the hands of the defendant. It is never enough for him to merely allege that he has suffered damages. He has to prove that indeed he has suffered the damages as alleged. The legal position in this area of the law is well-settled. It was stated with great clarity by Lord Goddard in the oft-cited case of *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 where the learned Lawlord had said thus: 'plaintiffs must understand that if

they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them to the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it'. This is still very much good law in so far as our Courts are concerned (see for example, the case of *Bukit Unggul Golf and Country Resort Sdn Bhd v Bukit Ringgit Holdings Sdn Bhd* [2017] MLJU 1817 and the case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 where the ratio of Lord Goddard was accepted and followed, as good law). Indeed, in the case of *Tan Sri Dato' Tajudin bin Ramli & Anor v Celcom (Malaysia) Bhd & Anor and another appeal (No 2)* [2014] 3 MLJ 842; [2014] AMEJ 0375 the age-old principle that a cause of action for conspiracy only accrues when damages is suffered is reaffirmed by the court. Also, it is still good law that conspiracies are only actionable if there is proof of damages occasioned to the plaintiff as enunciated by the English House of Lords case of *Quinn v Leathem* [1901] AC 495.

[40] Reverting to this appeal before us, the plaintiffs had also claimed for damages against all the defendants. However, during trial, the following had transpired when the first plaintiff was being cross-examined on the loss, thus damages issue, where she had responded, and we quote:

> S: I am asking you that I put it to you that you had not suffered any damages as a result of anything done by the HSBC Bank?
>
> J: Like what?
>
> S: Any losses?
>
> J: No.

Even the learned trial judge asked her, thus:

> Court: What do you mean by answering 'No'? You had not suffered any losses or anything done by HSBC?
>
> Witness: No.

She was again asked the same question, thus:

> You did not suffer any losses?
>
> J: No.

[41] In light of such evidence, we were of the view that the learned trial judge had no other option but to rule the way she did against the plaintiffs. Not only was this a non-starter against the fifth defendant, there was no evidence of loss against the other defendants. On the contrary, as was alluded to earlier by us, the first plaintiff had admitted that she did not suffer any losses.

[42] Premised on the above, after perusing the appeal records and having also considered the written and oral submissions by all able counsel, we were of the

unanimous view that the learned trial judge had made the correct findings on all the issues that needed to be determined by her in the circumstances of this case in the court below. We agreed with learned counsel for the first defendant that this appeal basically revolved round the findings of facts made by the learned trial judge. She was entitled to come to her inferences and the fact that we may come to our own different inferences from her, is not in itself, a good and valid ground for us to disturb her various findings, which to our minds, were supported by the evidence. Of course there is a big caveat there, in that such an inference so reached must not be so perverse, that no reasonable person so circumstanced would have come to such conclusion in making such inference. Suffice for us to say here that we did not find the learned trial judge's findings to be perverse. Absent that perverse finding by the learned trial judge, her decision is entitled to its due deference from the appellate court.

[43] In the final analysis, we were in agreement with the findings and the ultimate conclusion reached by the trial judge on the issue of conspiracy to defraud the plaintiff. In the upshot, we could not see how we ought to invoke our appellate powers to disturb the decision of the learned trial judge. We were ever mindful of the observation attributable to Lord Pearce in the case of *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 , on the proper invocation of appellate powers of the Court of Appeal of England. At p 430 the learned Lawlord had this to say:

> The function of a Court of Appeal is to set aside a Judgement that should not be allowed to stand because it occasions a miscarriage of justice. That wrong or miscarriage of justice may consist of a judgement in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgement in his favour. *But the fact that the right party seems to have succeeded in the court below will naturally make* a *Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases.* Such matters are questions of degree. (Emphasis added.)

[44] In this case, the right party seemed to have succeeded in the trial court and as such the extreme reluctance to intervene could not be lightly uplifted from our collective minds, so to speak, unless it had been shown by the plaintiffs that the impugned decision had been one that was plainly wrong, such that no reasonable tribunal could have arrived at the impugned decision, as did the trial court. That 'plainly wrong test' is attributable, at least in the local context, to the decision in the apex court case of *Lee Ing Chin@ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97.

[45] Applying the above test on appellate intervention to the evidence and circumstances before us pertaining to this appeal, we saw no occasion to intervene with the learned trial judge's decision and findings. Suffice to say that

the learned trial judge's decision could not be described, after due analysis by us, as one that was plainly wrong. To dispel all doubts, we found that the misdirection on the standard of proof on fraud by the learned trial judge, did not occasion any prejudice to the plaintiffs. The evidence was there. It was a matter of subjecting the very same evidence to the correct standard of proof, albeit it to a lower standard. The evidence led by the plaintiffs in this case was unable even to meet that lower standard on the balance of probabilities, qualitatively as well as quantitatively. We were in unison that the learned trial judge had appreciated the evidence led before her judiciously and assigned the weight to the evidence adduced by the witnesses before her. She had found the first plaintiff's evidence to be more improbable as compared to those of the defendant's witnesses. The second plaintiff very much repeated what the first plaintiff had told her. We were of the view that the learned trial judge did not lose the distinct advantage of having the first-hand opportunity of observing the demeanour of the various witnesses who had appeared before her during the course of the trial.

CONCLUSION

[46] To recapitulate, for grounds proffered above, we had dismissed this appeal. The decision of the High Court dated 22 December 2014 was affirmed. Costs of RM20,000 each to first, and fifth defendants. Costs of RM20,000 to second and third defendants as global costs. All costs were subjected to payment of allocatur fees. Deposit was refunded to the plaintiffs as the appellants before us.

Appeal dismissed; High Court decision affirmed.

Reported by Ashok Kumar